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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Marvin D. Brody,
Appellant,
v.
Geared Equity, LLC, et al.,
Appellees.

Lead No. CV-13-02090-PHX-NVW

Consolidated with:

No. CV-13-02591-PHX-NVW

Marvin D. Brody,
Appellant,
v.
Geared Equity, LLC, et al.,
Appellees.

ORDER

These consolidated appeals arise out of Chapter 11 bankruptcy proceedings of Debtor/Appellant Marvin D. Brody. Appellee Geared Equity, LLC is a secured creditor. The amount in play in these appeals is about \$200,000 in default interest. This is a surplus estate bankruptcy.

I. The Transaction and Initial Proceedings

Brody borrowed \$1.0 million, due in six months, from Geared Equity secured by a second lien behind a \$2.6 million first lien on a house in Coronado, California. Two months later he borrowed another \$300,000, also due four months thereafter. The loans

1 were for improvements to the house, to be resold to repay the loans and return Brody's
2 investment and a hoped-for profit. The notes called for 18% annual interest and 30%
3 default interest. Brody invested another \$150,000 in improving the house. All the loans
4 were over-secured, whether the house's value was \$8.0+ million, as Brody contends, or
5 the \$6.6 million at which it later sold.

6 Brody did not complete the improvements or resell the house in time, and the
7 loans went into default on September 5, 2012. Brody asked Geared Equity to delay
8 foreclosure while he continued marketing the property, as a pending foreclosure or
9 consequent bankruptcy proceeding would depress the market value of the house. He
10 opened up his construction and marketing activities to Geared Equity. The lender
11 delayed four more months before commencing a deed of trust sale on January 18, 2013.
12 Brody filed chapter 11 bankruptcy proceedings on February 11, 2013, to stop the
13 trustee's sale two days later.

14 On May 13, 2013, Brody filed and sought approval of a plan of reorganization and
15 disclosure statement that would cure the defaults upon a sale of the house, with post-
16 default interest at the 18% contract rate, not the 30% default rate (Bk. Doc. 65). Geared
17 Equity moved on July 26, 2013, to lift the stay to proceed with the trustee's sale (Bk.
18 Doc. 74), and four days later Brody moved to approve a pending \$6.6 million sale by
19 August 16, 2013, and for accelerated approval of the plan and disclosure statement (Bk.
20 Docs. 81, 79). The motions were expedited to an August 9, 2013 hearing.

21 **II. Agreements of the Parties at the August 9, 2013 Hearing and the Appeals**

22 Brody sought accelerated approval of the pending sale and of the proposed plan and
23 disclosure statement, rather than a sale under 11 U.S.C. § 363 outside the plan. He did so
24 to take advantage of the rule that a cure of a default in the plan freed the debtor of the
25 higher default interest rate and left the creditor unimpaired and therefore not entitled to
26 vote on the plan. *See In re Entz-White Lumber & Supply, Inc.*, 850 F.2d 1338, 1341–42
27 (9th Cir. 1988). But if the sale was under 11 U.S.C. § 363 before and outside the
28 confirmed plan, the post-default interest would not be limited to the contract rate and the

1 default rate would have to be paid to render Geared Equity unimpaired. *See Gen. Elec.*
2 *Capital Corp. v. Future Media Prods. Inc.*, 536 F.3d 969, 973, *amended*, 547 F.3d 956
3 (9th Cir. 2008).

4 Geared Equity disputed that a cure even under an approved plan would suffice
5 without default interest. It was undisputed that Brody would have to sell under a
6 confirmed plan to have any chance to avoid the default interest rate. But closing the
7 proposed August 16, 2013 sale for \$6.6 million would benefit both sides. Geared Equity
8 would get its principal, contract interest, and attorney's fees without further delay or
9 contingency. Brody would get some return, though not all he hoped for. The need for
10 and risks from threatened foreclosure would be gone. Therefore, the parties agreed at the
11 August 9, 2013 hearing to let the August 16, 2013 sale proceed, leaving Brody in the
12 same position he would be if the sale were under a confirmed plan. Geared Equity so
13 agreed in clear terms:

14 What I propose we do today is enter the 363 sale order with an
15 understanding, and your Court can rule that it is without prejudice to any of
16 these arguments, meaning that if we go down the road, you know, some
17 ways and then we confirm the plan, that we will agree that the time delay --
18 the temporal delay between the 363 sale and when you consider the plan
19 down the road **won't have any effect on their *Entz-White* arguments.**
We're fine with that. Because that just preserves the status quo, versus
having a confirmation order entered. So that would be our suggestion.

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21 And I've conferred with my client. And I'm perfectly willing to represent
22 on the record, and you can -- **you can reflect it in the minute entry,**
23 however you want to do it, that any plan confirmation order that may be
24 entered down the road when we take up these issues, and in the meantime
25 try to find a way to get it resolved, would be without prejudice to their
Entz-White argument; meaning that the fact that the 363 closed and then
there's **this temporal gap doesn't foreclose their *Entz-White* arguments.**
I would be fine with that.

26 Appellant's Excerpts of Record at 319–21 (emphasis added). Geared Equity did not want
27 delay in the sale or think it needed an extra obstacle to Brody's strategy to avoid the
28 default interest rate. Geared Equity had the courage of its convictions.

1 However, when submitting a proposed form of order to the Bankruptcy Court,
2 Geared Equity attempted to renounce its agreement and waiver previously made in open
3 court. On August 16, 2013, the Bankruptcy Court entered an order rejecting Brody's
4 position on the merits, relying on Congress's 1994 amendment to 11 U.S.C. § 1123(d)
5 (Bk. Doc. 116). The Bankruptcy Court therefore denied confirmation of Brody's plan as
6 written without default interest to cure the Geared Equity loans. On December 10, 2013,
7 this Court granted Brody's motion for interlocutory appeal pursuant to 28 U.S.C.
8 § 158(a)(3) (Doc. 17).

9 By order of November 21, 2013, the Bankruptcy Court denied Brody's objection
10 to Geared Equity's claim, upholding the 30% default interest rate as the August 16, 2013
11 order had, and finding the interest not a penalty (Bk. Doc. 207). Brody appealed that
12 order on December 4, 2013 (Bk. Doc. 213). The briefing on the second appeal concluded
13 on April 17, 2014, and the two appeals were consolidated on May 19, 2014 (Doc. 25).
14 The money has been set aside pending the outcome of these appeals.

15 **III. *Entz-White* Remains Good Law and the Law in the Ninth Circuit**

16 The rule of *Entz-White*, 850 F.2d 1338, is that an otherwise full cure of a debtor's
17 default does not require payment of post-default interest at the higher default rate. The
18 Ninth Circuit so held based on persuasive case authority from analogous situations and
19 without an explicit statutory definition of cure.

20 Geared Equity presents two arguments to escape this rule. First is that the
21 qualification of *Future Media*, 536 F.3d 969, governs here because the August 16, 2013
22 sale was done before and outside a confirmed plan. This argument is foreclosed by
23 Geared Equity's express agreement and waiver at the August 9, 2013 hearing that the sale
24 may go ahead "without prejudice to their *Entz-White* argument; meaning that the fact that
25 the 363 closed and then there's this temporal gap doesn't foreclose their *Entz-White*
26 arguments." Geared Equity was "fine with that" and "that would be our suggestion."
27 They made other statements to the same effect. Geared Equity's attempt a few days later
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1 and again in these appeals to retreat from its agreement and waiver is ineffective. That
2 argument fails.

3 Geared Equity's other argument is that Congress overturned the rule in *Entz-White*
4 when it amended 11 U.S.C. § 1123(d) in 1994. Lower courts have divided on this
5 question. The ruling in this case parts with the interpretation of both the bankruptcy
6 judges in this District who addressed this before. *In re Phoenix Bus. Park Ltd. P'ship*,
7 257 B.R. 517, 519–23 (Bankr. D. Ariz. 2001) (Case, J.); *In re DSBC Investments, L.L.C.*,
8 No. 4:09-BK-03146, 2009 WL 2998940, at *2 (Bankr. D. Ariz. Sept. 11, 2009) (Marlar,
9 J.) (“This court does not need to re-invent the wheel, nor could it write more eloquently
10 than Judges Morgan and Case, in reaching the same conclusion.”); *accord In re Zamani*,
11 390 B.R. 680, 685–87 (Bankr. N.D. Cal. 2008) (Morgan, J.) Those judges have rejected
12 that interpretation of the 1994 amendment of 11 U.S.C. § 1123(d).

13 Rather than repeat at length what Judge Case has already said so well, this Court
14 adopts his opinion in *In re Phoenix Bus. Park Ltd. P'ship*. *Entz-White* remains the law of
15 the circuit, binding on this Court. Even as *res nova*, this Court finds it good law now, as
16 it was then. The 1994 amendment of 11 U.S.C. § 1123(d) does not sustain the orders on
17 appeal.


18 If the 1994 amendment of 11 U.S.C. § 1123(d) touches on the *Entz-White* rule at
19 all, it more plausibly codifies that rule than repeals it, as Professor Klee concluded long
20 ago. Kenneth N. Klee, *Adjusting Chapter 11: Fine Tuning the Plan Process*, 69 Am.
21 Bankr. L. J. 551, 558 (Fall 1995). Judge Collins's concern that Brody should have to pay
22 the odious 30% default interest rate because he agreed to it and the estate has a surplus
23 would fit this transaction if it had not gone into bankruptcy. If Geared Equity had taken
24 the gamble of working with Brody to a sale without a foreclosure, its right to the 30%
25 post-default interest rate would have been secure. But bankruptcy is in the background of
26 every commercial agreement, and there can be no reliance on a term that bankruptcy law
27 defeats. One can only hope and work to keep it out of bankruptcy. Geared Equity chose
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1 its advantages when it attempted to enrich itself with a multi-million dollar forfeiture of
2 the equity in the house and thus forced Brody into bankruptcy.

3 Because the November 21, 2013 order in the second appeal was predicated on the
4 August 16, 2013 order in the first appeal, the November 21, 2013 order too is in error and
5 must be reversed.

6 IT IS THEREFORE ORDERED that the Clerk enter judgment reversing the
7 orders of the Bankruptcy Court entered August 16 and November 21, 2013 (Bk. Docs.
8 116, 207) and remanding this case to the Bankruptcy Court for further proceedings
9 consistent with this order. The Clerk shall terminate these appeals.

10 Dated this 6th day of August, 2014.

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14 Neil V. Wake
15 United States District Judge
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